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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 578

EFFIE EMERSON WALSH, Petitioner,

v.

BERNARD A. WALSH

BRIEF IN OPPOSITION TO APPLICATION OF PETITIONER FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

The respondent, Roovie House Walsh, opposes the application of petitioner for a *writ of certiorari* for the reason that no federal questions are involved and for the further reason that the federal questions allegedly involved have not been presented to any of the Courts below.

STATEMENT

Because of the alleged inability of the petitioner to advance the costs for printing the record we have waived this requirement and therefore are forced to file

this brief without the benefit of the record in the case other than the transcript filed in the Supreme Court of Louisiana.

On page 2 of the petition for the writ, jurisdiction is invoked under Section 1257 (3) of the *Judicial Code, 28 U.S.C. 1257 (3).*

On the same page are stated the three questions presented to this Court. Only the first of these, as we see it, involves any federal question.

A reading of the "Conclusion" on page 18 of the present petition shows that the only federal question relied upon is whether or not the Act of Louisiana providing for substituted service is constitutional within the requirements of *Section 1 of the 14th Amendment to the Constitution of the United States.*

ISSUES IN STATE COURT

Effie Emerson Walsh claiming to be a resident of Washington, D. C. appeared in Suit No. 14798 on the Docket of the Twenty Sixth Judicial District Court, Bossier Parish, Louisiana in proceedings entitled Bernard A. Walsh v. Effie Emerson Walsh and by making all interested parties defendants [1] attempted to annul a judgment of divorce entered in favor of Bernard A. Walsh,

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1/ She there invoked the same substituted service, to-wit: the appointment of a **curator ad hoc**, which she here attempts to attack, **R-45.**

then deceased, against her, alleging as grounds therefor:

1. That the Court was without *jurisdiction ratione materiae*, because the plaintiff Bernard A. Walsh was not a resident of Bossier Parish, Louisiana, and

2. That there had been no living separate and apart as required by Act 430 of 1938 of the Legislature of Louisiana, and that therefore the divorce had been granted upon fraudulent and untrue allegations and evidence. [2]

These issues were decided in favor of plaintiff by the trial court (R-183), but the decision of the trial court was reversed and the contentions were decided adversely to the petitioner by the Supreme Court of Louisiana. [3]

The petitioner raised no federal question in the trial court and as will appear by the opinion of the Supreme Court of Louisiana none was presented to it nor passed upon by it. [4]

2/ See Page 40 of the record in the Supreme Court of the State of Louisiana.

3/ **Walsh v. Walsh, 42 So. (2) 860 (1949)**

4/ In the application for rehearing in the Supreme Court of Louisiana the petitioner purported to invoke the 14th Amendment to the Constitution of the United States. In paragraph 6 of the application the equal protection clause of this Amendment is referred to in a manner not only ambiguous but having no apparent relation to any constitutional arguments now relied upon. In paragraph 7 the due process clause is referred to but on an entirely different ground from that invoked before this Court.

ARGUMENT

We consider it too well settled law, supported by decisions more numerous than we care to mention, as well as by the Rules of this Court that writs of *certiorari* will not be granted by this Court when the federal question has not been timely raised in the trial court and certainly not when it has not been raised in either the trial court or the appellate court except in an illusory manner in an application for rehearing in the Supreme Court of the State. [5]

Rule 38 of the Supreme Court of the United States Section 5, states that the writ is not a matter of right and can only be granted when special and important reasons therefor exist Under Subsection (a) thereof it is stated that a federal question of substance must have been decided by the state court.

Rule 12, Section 1, states that in the jurisdictional statement there shall be contained a statement of the grounds upon which it is contended that the questions involved are substantial. Nothing to this effect appears in the present petition.

5/ To strike with nullity the procedure used in this case would be to overturn the procedure used in the courts of Louisiana for over a century and a half. The title to millions of dollars worth of property and the stati of untold persons would be affected. Certainly the courts of the State of Louisiana should first be given an opportunity to pass upon the validity of this process, condemned by Counsel for petitioner as "conducive to an unrestrained and fraudulent exploitation of the **ex parte divorce**", but never before so condemned by any other person or tribunal.

The same rule also provides that the jurisdictional statement shall specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them********** ; and the way in which they were passed upon by the Court. All of this is missing from the present petition. The reason is apparent. Petitioner who herself brought the action in nullity, could and should have attacked the statute or raised her constitutional objections in the trial court and could and should have given the state courts an opportunity to pass upon these consitiutional questions but failed and refused to do so. [6]

The only question presented by the petitioner in the trial court and in the Supreme Court of Louisiana were questions of fact, namely the residence, *vel non.* in Louisiana of Bernard A. Walsh and the sufficiency of the evidence adduced in the divorce proceedings.

Will it not suffice to cite just several decisions of this Court to the effect that federal questions not raised in the courts below cannot be reviewed by the United States Supreme Court. [7]

6/ Vide note 1.

7/ See **Selover, Bates & Co. v. Walsh**, 33 S. Ct. 69, 226 U.S. 112, 57 L. Ed. 146 (1912); **Dill v. Ebey**, 33 S. Ct. 620, 229 U.S. 190, 57 L. Ed. 1148 (1913); **Southern Pacific Co. v. State of Louisiana**, 39 S. Ct. 313, 249 U.S. 472, 63 L. Ed. 713 (1919); **Appelby v. Buffalo**, 31 S. Ct. 699, 221 U.S. 524, 55 L. Ed. 838 (1911).

The record of the Court below must show that the constitutional question was presented and passed upon. [8]

Even if it be considered that the ambiguous references to the *14th Amendment to the Constitution of the United States* contained in the application for rehearing in the Supreme Court of Louisiana [9] could be considered as the raising of a federal question, decisions of this Court too numerous to mention state that the writ will not be granted where the question was presented for the first time in an application for rehearing and particularly *where no utterance of the state court could be deemed to have passed upon or raised any federal question.* [10]

In *Pim v. City of St. Louis* [11] from which we quote, this Court held:

> "Upon inspecting the record we find that no federal right was set up or claimed, in any form, until after the final decision of the case by the Supreme Court of Missouri, and then by a petition for rehearing. That petition was overruled by that court without any determination of the alleged federal question, indeed without any allusion to it. The

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8/ **Baily v. Anderson, 66 S. Ct. 66, 326 U.S. 203, 90 L. Ed. 3 (1945).**

9/ See note 4.

10/ **Radio Station W.O.W. v. Johnson, 65 S. Ct. 1475, 326 U.S. 120, 89 L. Ed. 2092 (1945); Worthy v. Commissioner, 76 U.S. 611, 9 Wall 611, 19 L. Ed. 965 (1869); Scudder v. Coler, 20 S. Ct. 26, 175 U.S. 32, 44 L. Ed. 62 (1899); Bonner v. Gorman, 29 S. Ct. 483, 213 U.S. 86, 53 L. Ed. 709 (1909); Hiawassee River Power Co. v. Carolina-Tennessee Power Co., 40 S. Ct. 330, 252 U.S. 341, 64 L. Ed. 601 (1920).**

11/ **17 S. Ct. 322, 165 U.S. 273, 41 L. Ed. 714 (1897).**

claim of a federal right came too late, so far as the revisory power of this court is concerned. Loeber v. Schroeder, 149 U.S. 580, 585 (37: 856, 860); Sayward v. Denny, 158 U.S. 180, 183 (39: 941, 942)."

CONCLUSION

We submit that by the Judicial Code, the Rules of this Court and the uninterrupted jurisprudence of this Court, it is without jurisdiction to entertain the petition for a writ of certiorari allegedly presenting federal questions never before urged.

Respectfully Submitted,

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